

No. 23A243

IN THE SUPREME COURT OF THE UNITED STATES

VIVEK H. MURTHY, SURGEON GENERAL, ET AL., APPLICANTS

v.

MISSOURI, ET AL.

THIRD SUPPLEMENTAL MEMORANDUM REGARDING
EMERGENCY APPLICATION FOR A STAY

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The government respectfully files this supplemental memorandum to explain why the Fifth Circuit's amended decision in this case further confirms that this Court should grant the government's pending application for a stay. In short, the amended decision relies on the same flawed conception of the state-action doctrine to extend injunctive relief to another set of government defendants. In extending the injunction, the decision vividly illustrates the expansive and malleable nature of the Fifth Circuit's novel test for state action, underscoring both the court's errors on the merits and the grave harms imposed by an injunction requiring thousands of government employees to adhere to the Fifth Circuit's standard on pain of contempt.

1. On July 4, 2023, the district court issued a sweeping preliminary injunction prohibiting seven groups of government defendants from engaging in ten types of communications regarding content moderation on social media, subject to eight carveouts.

Appl. App. 156a-162a, 176a. On September 8, the Fifth Circuit affirmed the injunction with respect to four of those groups (the defendants in the White House, the Surgeon General's office, the Federal Bureau of Investigation (FBI), and the Centers for Disease Control and Prevention (CDC)), vacated nine of the prohibitions and modified the tenth, and vacated all of the carveouts. Appl. 9-13; Appl. App. 248a. The court administratively stayed the injunction for ten days. Appl. App. 252a.

On September 14, 2023, the government sought an emergency stay of the district court's injunction, as modified by the Fifth Circuit, pending certiorari. Respondents filed their opposition on September 20, and the government filed a reply on September 21. Justice Alito administratively stayed the injunction through September 27. The application remains pending.

Meanwhile, on September 22, 2023, after the stay application in this Court was fully briefed, respondents filed a petition for panel rehearing in the Fifth Circuit. The Fifth Circuit initially issued an order that appeared to summarily grant rehearing, but then rescinded that order, directed the government to respond to the petition by September 28, and administratively stayed the injunction pending resolution of the petition. 23-30445 C.A. Doc. 256-2, at 1-2 (Sept. 26, 2023). Because of that administrative stay, the government informed this Court that there was no need for the Court to act on the stay application before Justice Alito's administrative stay expired on September 27.

2. On October 3, 2023, the Fifth Circuit granted panel rehearing and amended its opinion. See C.A. Doc. 268-1, at 1-74 (Revised Op.). The revised opinion extends the modified injunction to cover the Cybersecurity and Infrastructure Security Agency (CISA) and six CISA officials and employees. See id. at 13-14, 59-60, 74.¹ The Fifth Circuit did not substantively alter the portions of its original opinion articulating the relevant legal standards and addressing other defendants, and the scope of the injunction is otherwise unchanged. The court administratively stayed the injunction for ten days -- that is, through October 13 -- and issued the mandate forthwith. Id. at 74.

In its revised opinion, the Fifth Circuit stated that CISA “work[ed] in close connection with the FBI” to “h[o]ld regular industry meetings with the platforms concerning their moderation policies.” Revised Op. 13. The court additionally noted that CISA “engaged in ‘switchboarding’ operations * * * by forwarding flagged content from [third parties] to the platforms” -- for example, sharing content with the relevant platform that local election officials “deemed to be disinformation aimed at their jurisdiction” during a federal election. Ibid. The court also

¹ Specifically, the injunction now extends to CISA; the Director of CISA, Jen Easterly; the Senior Cybersecurity Advisor and Senior Election Security Leader, formerly Kim Wyman; Lauren Prottentis; Geoffrey Hale; Allison Snell; and Brian Scully. Revised Op. 74. Because the Fifth Circuit affirmed the injunction as to those additional defendants, the government respectfully requests that they be deemed to be applicants here. Cf. Appl. ii n.*.

stated that “[l]ike the CDC for COVID-related claims, CISA told the platforms whether certain election-related claims were true or false.” Id. at 14. The court concluded that “CISA’s actions apparently led to” the platforms’ “moderation policies being altered and content being removed or demoted.” Id. at 14.

The Fifth Circuit’s original opinion had held that “although CISA flagged content for social-media platforms as part of its switchboarding operations, based on this record, its conduct falls on the ‘attempts to convince,’ not ‘attempts to coerce,’ side of the line” because “[t]here is not sufficient evidence that CISA made threats of adverse consequences -- explicit or implicit -- to the platforms for refusing to act on the content it flagged.” Appl. App. 238a. The court also had held that “on this record, [CISA’s] requests -- although certainly amounting to a non-trivial level of involvement -- do not equate to meaningful control” because “[t]here is no plain evidence that content was actually moderated per CISA’s requests or that any such moderation was done subject to non-independent standards.” Ibid.

In its revised opinion, the Fifth Circuit reached the opposite conclusion, holding that “CISA likely significantly encouraged the platforms’ content-moderation decisions” for two reasons. Revised Op. 60. First, the court stated that “CISA was the ‘primary facilitator’ of the FBI’s interactions with the social-media platforms.” Id. at 59. Second, the court stated that “CISA used its frequent interactions with social-media platforms to push them to

adopt more restrictive policies on censoring election-related speech” and “CISA officials affirmatively told the platforms whether the content they had ‘switchboarded’ was true or false,” meaning that “when the platforms acted to censor CISA-switchboarded content, they did not do so independently.” Id. at 59-60.

3. For the reasons set forth in the government’s prior filings, this Court should stay the district court’s injunction pending certiorari and, if it wishes to further expedite proceedings, should construe the government’s application as a petition for a writ of certiorari and grant both a stay and the petition. The Fifth Circuit’s revised opinion is substantively identical to its previous opinion, with the only relevant change being the treatment of the CISA defendants.

The extension of the injunction to the CISA defendants rests on the same flawed state-action theories underlying the court’s affirmance of the injunction with respect to the other defendants -- namely, that “coercion” can be established absent any threat (implicit or explicit) of adverse action and that “significant encouragement” can be established by mere “entanglement.” Compare Appl. App. 207a-219a (discussing those conceptions of coercion and significant encouragement), with Revised Op. 30-42 (same). And the extension of the already-overbroad injunction only worsens the irreparable harm the injunction imposes upon the government and the public and further tilts the balance of equities in favor of relief. Accordingly, the district court’s injunction, as modified

by the Fifth Circuit in its revised opinion, should be stayed in its entirety for the reasons the government has already set forth. See Appl. 13-40; Reply 1-18.

Indeed, the reinstatement of the injunction with respect to the CISA defendants only further illustrates the Fifth Circuit's legal errors. The Fifth Circuit relied on its view that CISA supposedly "'facilitat[ed]'" the "FBI's interactions with the social-media platforms." Revised Op. 59. But the court's rationale with respect to the FBI was that any communication from the FBI is inherently coercive because the FBI is a powerful law-enforcement agency, and that the platforms' acceptance of an FBI recommendation was sufficient to establish "significant encouragement" under the lax "entanglement" standard. See id. at 55-57. The government has explained why those theories lack merit. See Appl. 25-26, 31-32; Reply 9, 14-15. And because the FBI's own conduct did not transform the platforms' content-moderation decisions into state action, the CISA defendants cannot have engaged in state action merely by facilitating the FBI's efforts -- especially given that CISA itself does not exercise any law-enforcement authority over the platforms.

The Fifth Circuit's second rationale fares no better. The court asserted that CISA "affirmatively told the platforms whether the content they had 'switchboarded' was true or false." Revised Op. 59; see id. at 14. The court did not cite anything in the

record to support that assertion.² But even if the assertion were true, it would not on its own constitute coercion or significant encouragement; to the contrary, government officials are entitled to express their own views of what is "true or false" in the marketplace of ideas -- especially when asked for their views by private third parties (here, the platforms). "Indeed, it is not easy to imagine how government could function if it lacked this freedom." Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009).

As with its similar conclusion with respect to the CDC's advice on COVID-related claims, the Fifth Circuit cited no precedent for its conclusion that when private companies choose to request or follow advice from the government, the companies thereby become state actors. The most that the court could muster was the assertion that "CISA's action apparently led to the moderation

² The Fifth Circuit might have been referring to the testimony of a CISA witness who said that he had forwarded to Facebook a statement from someone claiming to have been a Pennsylvania poll worker who destroyed ballots. C.A. ROA 13,421. The witness testified that -- in direct answer to a follow-up question from Facebook -- he responded that based on his reading of an official statement from Pennsylvania, "both components of the narrative are false. The person is not a poll worker and no ballots were destroyed." Ibid. The witness testified that otherwise CISA generally just forwarded statements from election officials to platforms, often at the platforms' request. See id. at 13,421-13,424.

The Fifth Circuit did not explain how such an incident could have converted the social-media platforms into state actors writ large or rendered all of CISA's actions unconstitutional. Nor did the court explain why it now believed that CISA's mere relaying of statements constituted "significant encouragement" rather than (at most) a permissible "attempt[] to convince," as the court itself had previously held. Appl. App. 238a.

policies being altered and content being removed or demoted.” Revised Op. 14 (emphasis added). The court cited no evidence supporting that statement. And even if the statement were true, it would not mean that CISA’s actions transformed the platforms’ private decisions into state action because it would not demonstrate that CISA offered the type of positive incentives that overwhelm a party’s independent judgment, as required under a proper view of the state-action doctrine. See Appl. 30-33.

* * * * *

For the reasons set forth above and in the government’s prior filings, this Court should stay the district court’s preliminary injunction pending the timely filing and disposition of a petition for a writ of certiorari. At a minimum, the Court should stay the injunction insofar as it extends beyond actions specifically targeting content posted by individual respondents. And if the Court wishes to further expedite proceedings, it should construe the application as a petition for a writ of certiorari and grant both a stay and the petition. Finally, because the Fifth Circuit’s administrative stay expires on October 13, 2023, the government respectfully requests that the Court extend the administrative stay if it has not acted on the application by that date.

Respectfully submitted.

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